

**EXHIBIT “H”**

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DEPENDABLE SHEET METAL dba  
DEPENDABLE HEATING AND AIR  
CONDITIONING (erroneously sued herein as  
DEPENDABLE SHEET METAL)

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

FAIRMONT SPECIALTY INSURANCE  
COMPANY, a Delaware corporation; and  
TIG INSURANCE COMPANY, a  
California corporation,

Plaintiffs,

v.

INSURANCE CORPORATION OF NEW  
YORK, a New York corporation;  
DEPENDABLE SHEET METAL, a  
California corporation; and DOES 1 through  
10,

Defendants.

DEPENDABLE SHEET METAL dba  
DEPENDABLE HEATING AND AIR  
CONDITIONING, a California corporation,

Counter-Claimant,

v.

FAIRMONT SPECIALTY INSURANCE  
COMPANY, a Delaware corporation; TIG  
INSURANCE COMPANY, a California  
corporation; GREGORY CLAUSER, an  
individual; THE INSURANCE  
CORPORATION OF NEW YORK, a New  
York corporation; HDR INSURANCE  
MANAGERS, LLC dba HDR  
INSURANCE SERVICES; NOVAPRO  
RISK SOLUTIONS, LP; and ROES 1  
through 200, inclusive,

Counter-Defendant.

CASE NO.: C07-03421 JL

**DEPENDABLE SHEET METAL'S  
COUNTER-CLAIM FOR:**

1. Breach of Written Contract – Failure to Defend;
2. Breach of Written Contract – Failure to Indemnify;
3. Breach of the Implied Covenant of Good Faith and Fair Dealing – Failure to Defend;
4. Breach of the Implied Covenant of Good Faith and Fair Dealing – Failure to Indemnify;
5. Reformation;
6. Professional Negligence;
7. Negligent Misrepresentation;
8. Declaratory Relief; and
9. Fraudulent Business Practices in Violation of Business and Profession Code § 17200

**EXHIBIT H**

1 Counter-Claimant, DEPENDABLE SHEET METAL dba DEPENDABLE HEATING  
2 AND AIR CONDITIONING, (erroneously sued herein as DEPENDABLE SHEET METAL,  
3 hereinafter referred to as "DEPENDABLE" or "Counter-Claimant") hereby alleges as follows:

4 **PARTIES**

5 1. Counter-Claimant, DEPENDABLE is, and at all times herein mentioned was, a  
6 corporation duly organized and existing under the laws of the state of California.

7 2. Counter-Claimant is informed and believes that THE INSURANCE  
8 CORPORATION OF NEW YORK (hereinafter referred to as "INSCORP" or "Counter-  
9 Defendant") is a New York Corporation and at all times herein mentioned either admitted to  
10 doing business as an insurer under the laws of the state of California or authorized to sell  
11 insurance in the state of California through a licensed surplus lines broker.

12 3. Counter-Claimant is informed and believes that FAIRMONT SPECIALTY  
13 INSURANCE COMPANY was formerly RANGER INSURANCE COMPANY (hereinafter  
14 referred to as "RANGER" or "Counter-Defendant") is a Delaware Corporation and at all times  
15 herein mentioned either admitted to doing business as an insurer under the laws of the state of  
16 California or authorized to sell insurance in the state of California through a licensed surplus  
17 lines broker.

18 4. Counter-Claimant is informed and believes that TIG INSURANCE COMPANY  
19 was formerly named TRANSAMERICA INSURANCE COMPANY (hereinafter referred to as  
20 "TRANSAMERICA" or "Counter-Defendant") is a California Corporation and at all times  
21 herein mentioned either admitted to doing business as an insurer under the laws of the state of  
22 California or authorized to sell insurance in the state of California through a licensed surplus  
23 lines broker.

24 5. Counter-Claimant is informed and believes that HDR INSURANCE  
25 MANAGERS, LLC dba HDR INSURANCE SERVICES (hereinafter referred to as "HDR" or  
26 "Counter-Defendant") at all times herein mentioned is a Limited Liability Corporation duly  
27 organized and existing under the laws of the state of California and held itself out to be  
28 authorized to sell insurance in the state of California as a retail broker and maintains its principal

1 place of business in Sacramento, California. HDR was retained on behalf of Counter-Claimant  
2 to secure liability insurance as more specifically referenced herein. HDR Insurance Managers  
3 LLP is an affiliate of HDR.

4 6. Counter-Claimant is informed and believes and hereon alleges that at all material  
5 times INSCORP owned a 20% portion of HDR'S affiliated companies (HDR Insurance  
6 Managers LLP and/or HDR Insurance Managers LLC).

7 7. Counter-Claimant is informed and believes and hereon alleges that Counter-  
8 Defendant GREGORY CLAUSER is an individual domiciled in California and currently  
9 working in the County of Contra Costa in. At all relevant times, GREGORY CLAUSER was  
10 an employee of HDR and held himself out as an authorized HDR broker.

11 8. Counter-Claimant is informed and believes that NOVAPRO RISK SOLUTIONS  
12 L.P. (hereinafter referred to as "NOVAPRO"), formerly known as Ward North America L.P.,  
13 at all times herein mentioned is a limited partnership duly organized and existing under the laws  
14 of the state of California and authorized to conduct claims administration, place insurance, and  
15 serves as a claims handling representative for the Counter-Defendant INSCORP in the state of  
16 California and maintains its principal place of business in San Diego, California, but has  
17 employees working out of HDR'S office located in Sacramento, California. Based on  
18 information and belief, Counter-Claimant alleges that NOVAPRO is affiliated with HDR and is  
19 the alter ego of HDR and/or is responsible for the liabilities of HDR.

20 9. Counter-Claimant is informed and believes and thereon alleges that ROES 1 –  
21 100, are persons, corporations or other entities which reside or are authorized to do and are  
22 doing business in the state of California as insurers. The true identities of ROES 1 – 100 are  
23 currently unknown to Counter-Claimant and Counter-Claimant therefore prays for leave to  
24 amend this Counter-Claim to assert the proper names of each insurer when its identity is  
25 discovered. Each of ROES 1 – 100 issued one or more policies of insurance which names  
26 Counter-Claimant as an insured and provides or potentially provides coverage for all or a  
27 portion of the claims made against Counter-Claimant in the underlying claims for construction  
28 defect damages as referred to in this Counter-Claim.

10. Counter-Claimant is informed and believes and thereon alleges that ROES 101 – 200, are persons, corporations or other entities which reside or are authorized to do and are doing business in the state of California. The true identities of ROES 101 – 200 are currently unknown to Counter-Claimant and Counter-Claimant therefore prays for leave to amend this Counter-Claim to assert the proper names of each business when its identity is discovered. Each of ROES 101 – 200 was the managerial agent, employee, predecessor, successor, joint venturer, co-conspirator, alter-ego, and/or representative of one or more of the other Counter-Defendants named herein or identified as ROES, and acted with the permission, authorization and/or ratification and consent of the other Counter-Defendants.

11. Counter-Claimant is informed and believes and thereon alleges that ROES 201 – 300, are persons, corporations or other entities which reside or are authorized to do and are doing business in the state of California as wholesale, retail or intermediate agents and/or brokers to sell insurance for insurers. The true identities of ROES 201 – 300 are currently unknown to Counter-Claimant and Counter-Claimant therefore prays for leave to amend this Counter-Claim to assert the proper names of each business when its identity is discovered. Each of ROES 201 – 300 was the managerial agent, employee, predecessor, successor, joint venturer, co-conspirator, alter-ego, and/or representative of one or more of the other Counter-Defendants named herein or identified as ROES, and acted with the permission, authorization and/or ratification and consent of the other Counter-Defendants.

12. Counter-Claimant is informed and believes, and thereon alleges that each fictitiously named Counter-Defendant is in some way responsible for, participated in, or contributed to the matters of which Counter-Claimant complains and has legal responsibility for those matters.

13. This Court has personal jurisdiction over the Counter-Defendants, and each of them, as they are at all relevant times hereinafter mentioned incorporated, headquartered and/or engaged in the business of selling and/or placing insurance in the state of California.

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**THE POLICIES**

14. TRANSAMERICA and RANGER, and ROES 1–100, executed and delivered one or more policies of comprehensive general liability insurance to Counter-Claimant, including without limitation the following:

- a. TRANSAMERICA Policy No. T7-35026957 (effective August 9, 1993 to December 1, 1994);
- b. TRANSAMERICA Policy No. T7-35026957 (effective August 9, 1994 to December 1, 1995);
- c. TRANSAMERICA Policy No. T7-35026957 (effective August 9, 1995 to December 1, 1996); and
- d. RANGER Policy No. GLO 673880 00 (effective August 9, 1996 to December 1, 1997);

Collectively referred to hereinafter as the “TRANSAMERICA and RANGER Policies”.

15. True and correct copies of the common policy declarations, general provisions, premium calculations, commercial general liability declarations page, Insurance Services Office, Inc. (“ISO”) commercial general liability coverage form CG 00 01 11 88 and commercial general liability coverage endorsements from the TRANSAMERICA and RANGER Policies are collectively attached hereto as **Exhibit “A”** and incorporated herein by this reference as if set forth in full.

16. INSCORP, ROES 1 – 100 and ROES 101 – 110, executed and delivered one or more policies of comprehensive general liability insurance to Counter-Claimant, including without limitation the following:

- a. Policy No. CAIC 10016984 00 00 (effective August 9, 1997 to December 1, 1998);
- b. Policy No. CAIC 10016984 00 01 (effective December 1, 1998 to December 1, 1999);
- c. Policy No. CAIC 10016984 00 02 (effective December 1, 1999 to December 1, 2000); and

1 d. Policy No. CAIC 10016984 00 03 (effective December 1, 2000 to  
2 December 1, 2001).

3 Collectively referred to hereinafter as the "INSCORP Policies."

4 17. The Counter-Claimant retained HDR and GREGORY CLAUSER as its broker to  
5 secure liability insurance. At all material times, Counter-Claimant relied on the expertise of  
6 HDR and GREGORY CLAUSER in the securing of liability coverage for the benefit of Counter-  
7 Claimant. At all material times, HDR had a duty to disclose all its interest(s) between it and  
8 its affiliated companies with INSCORP prior to recommending INSCORP to Counter-  
9 Claimant. Notwithstanding that duty, HDR failed to make disclosures to Counter-Claimant that  
10 INSCORP had an ownership interest in HDR and/or its affiliated companies (HDR Insurance  
11 Managers LLP and/or HDR Insurance Managers LLC). Notwithstanding HDR'S being partially  
12 owned by INSCORP, it recommended to Counter-Claimant to purchase the INSCORP Policies  
13 through HDR and GREGORY CLAUSER and sold the INSCORP Policies directly to Counter-  
14 Claimant without disclosure to Counter-Claimant of any ownership or financial interest by  
15 INSCORP. Had INSCORP and/or HDR made the required disclosures, Counter-Claimant  
16 would not have purchased the INSCORP Policies recommended by HDR and GREGORY  
17 CLAUSER without receiving independent advice that the Policy terms and conditions were  
18 satisfactory.

19 18. Counter-Claimant is informed and believes and thereon alleges that, at all  
20 material times, INSCORP, GREGORY CLAUSER, and ROES 1 – 150 provided HDR with  
21 actual and/or ostensible authority, to issue the INSCORP Policies providing commercial  
22 general liability coverage to Counter-Claimant.

23 19. On or about August of 1997, GREGORY CLAUSER and HDR issued and  
24 provided to Counter-Claimant INSCORP Policy Number CAIC 10016984 00-00. A true and  
25 correct copy of INSCORP Policy Number CAIC 10016984 00-00 with effective dates of  
26 August 9, 1997 to December 1, 1998, including, common policy declarations, general  
27 provisions, commercial general liability declarations page, Insurance Services Office, Inc.  
28 ("ISO") commercial general liability coverage form CG 00 01 11 88 and commercial general

1 liability coverage endorsements (effective August 9, 1997 to December 1, 1998) is attached  
2 hereto as **Exhibit "B"** and incorporated herein by this reference as if set forth in full; Exhibit  
3 "B" is hereinafter referred to as the "INSCORP Policy."

4 20. On or about December 1, 1998, HDR advised Counter-Claimant that the  
5 INSCORP Policy and coverage term were being renewed for the December 1, 1998 to  
6 December 1, 1999 period. At that same time, HDR and GREGORY CLAUSER also advised  
7 Counter-Claimant that it was not necessary to deliver (reissue) the entire insurance contract,  
8 since the INSCORP coverage was continuous in nature as the Policy was a mere renewal.

9 21. On or about November 11, 1999, HDR advised Counter-Claimant that the  
10 INSCORP commercial coverage was being renewed for the December 1, 1999 to December 1,  
11 2000 period. At that same time, HDR and GREGORY CLAUSER also advised Counter-  
12 Claimant that it was not necessary to deliver (reissue) the entire insurance contract, since the  
13 INSCORP policy was a mere renewal and provided the coverage found in the initial policy  
14 continuously.

15 22. On or about November 2000, HDR and GREGORY CLAUSER advised  
16 Counter-Claimant that their INSCORP commercial coverage was being renewed for the  
17 December 1, 2000 to December 1, 2001 period. At that same time, HDR and GREGORY  
18 CLAUSER also advised Counter-Claimant that it was not necessary to deliver (reissue) the  
19 entire insurance contract, since the INSCORP policy was a mere renewal of the initial  
20 INSCORP policy and the coverage found in the initial policy was continuous.

21 23. At all material times, Cross-Complaint was led to believe that the INSCORP  
22 Policies numbered CAIC 10016984 00 01, CAIC 10016984 00 02, and CAIC 10016984 00 03  
23 (hereinafter referred to as "Renewal Policies") provided it coverage as broad if not broader than  
24 the first INSCORP Policy (Policy number CAIC 10016984 00 00) because these later  
25 INSCORP Policies were to be mere renewal policies containing the identical terms and  
26 conditions contained in the first INSCORP Policy. Counter-Claimant was advised by  
27 GREGORY CLAUSER and HDR that copies of the INSCORP Renewal Policies were not  
28 needed because there were no material changes from the first INSCORP Policy, and at all

1 material times, Counter-Claimant relied on those representations to its detriment.

2 24. Based on the representation of HDR and GREGORY CLAUSER concerning the  
3 coverage under each Renewal Policy, coverage would be provided for claims of bodily injury  
4 and/or property damage resulting from construction defects arising from the completed work  
5 performed by Counter-Claimant, for damages sustained during the effective dates of the  
6 INSCORP Policies and that said coverage was not subject to date of manifestation since the  
7 renewal policies were to contain the identical coverage provided in the initial INSCORP  
8 Policy, i.e. full occurrence policy as set forth in the initial placement. It was only after  
9 Counter-Claimant tendered its defense to INSCORP after being sued in the subject underlying  
10 construction defect actions, was Counter-Claimant advised by NOVAPRO, the claims agent  
11 of INSCORP, that the INSCORP Policies contained an Endorsement described by INSCORP  
12 as the "Continuous and Progressive Injury Limitation" form IC IL 30 (03/97) which  
13 purportedly added an exclusion to the INSCORP Policies. According to NOVAPRO, this  
14 Endorsement provided as follows:

15 *CONTINUOUS AND PROGRESSIVE INJURY LIMITATION*

16 *This endorsement modifies insurance provided under the following:*

17 *All Liability Coverages in All Coverage Forms*

18 *A. This insurance does not apply to the following, which is added to the*  
19 *EXCLUSIONS:*

20 *All "bodily injury," "property damage," "personal injury" or*  
21 *"advertising injury" that is continuous or progressively deteriorating,*  
22 *and that is first manifest prior to the effective date or after the expiration*  
*of this policy. This exclusion applies even if such injury or damage*  
*continues or deteriorates during the term of this policy.*

23 *B. If this policy extends for more than one annual period, then the following*  
*applies:*

24 *1. The most we will pay for "bodily injury," "property damage,"*  
25 *"personal injury," and "advertising injury" that is continuous or*  
26 *progressively deteriorating, and that is first manifest during one*  
*of the periods of this policy, is the applicable limit of insurance*  
*available with respect to that one period.*

27 *2. The limit specified in paragraph B.1. above is the only limit that*  
28 *applies to all related "bodily injury," "property damage",*  
*"personal injury" or "advertising injury", regardless of whether*

1                    *such injury or damage existed before, or continues or*  
2                    *progressively deteriorates after, the period in which it is first*  
3                    *manifest.*

4                    C. *Within the meaning of this endorsement, injury or damage is manifest*  
5                    *when appreciable harm occurs that is or should be known to the insured,*  
6                    *the person, or organization harmed.*

7                    Counter-Claimant was never notified of any such intended limitation at time of placement  
8                    of each INSCORP Policy or any of the intended changes purportedly found in the INSCORP  
9                    Renewal Policies. Moreover, with respect to each Renewal Policy, at no time did Counter-  
10                  Claimant receive any separate written admonishment of any limitation/exclusion. As such, said  
11                  purported limitations are unenforceable under California law. In fact, as Counter-Claimant never  
12                  received any prior notice of subject limitation, the limitation was never agreed to by Counter-  
13                  Claimant. Furthermore, Counter-Defendants INSCORP, HDR and CLAUSER acted secretly  
14                  and in a clandestine manner if and when the INSCORP Policy was modified in the Renewal  
15                  Policies. At no time was there any assent to the addition of the "Continuous and Progressive  
16                  Injury Limitation" endorsement into any of the INSCORP Policies which purportedly intended  
17                  to exclude any coverage to Counter-Claimant for "*property damage*" that is "*first manifest*  
18                  *prior to the effective date or after the expiration of this policy* and which applies even if the  
19                  *injury or damage continues or deteriorates during the terms of the policy.* Based on  
20                  INSCORP'S failure to provide prior written notice of the subject material limitations prior to  
21                  placement, based on the ambiguity of this limitation purportedly contained in the INSCORP  
22                  Policies, and further based on the actual sustaining of damage in each of the underlying actions  
23                  set forth below during the INSCORP Policy periods, INSCORP's denial of coverage was  
24                  without reasonable basis and in bad faith.

### 25                  **THE UNDERLYING ACTIONS AND TENDER OF THE DEFENSE**

26                  25. At all relevant times, Counter-Claimant was a licensed sheet metal contractor  
27                  working for various developers involved in the construction of residential homes in separate  
28                  projects in Northern California and in the County of Contra Costa, State of California.

29                  26. The homeowners of some of these projects have filed lawsuits and/or presented  
30                  claims of property damage to the respective developer entities. In each instance involving a

lawsuit or property damage claim, these developer entities have, in turn, filed cross-complaints against and/or tendered the property damage claims to Counter-Claimant.

27. The Underlying Actions are as follows:

- a. A lawsuit entitled *Abzarian v. Richland Development Corporation*, et al. Contra Costa County Superior Court Case No. C05-00147 ("Abzarian Action");
- b. A lawsuit entitled *Belsky v. Presley Companies*, Contra Costa County Superior Court Case No. C05-00837 ("Belsky Action");
- c. A lawsuit entitled *Capella, et al. v. Kaufman Broad of Northern California*, Alameda County Superior Court Case No. RG 06259608 ("Capella Action");
- d. A lawsuit entitled *Cohen, et al. v. Presley Homes, et al.*, Contra Costa County Superior Court Case No. MSC06-02548 ("Cohen Action");
- e. A lawsuit entitled *Crawford v. et al. v. Western Pacific, et al.*, El Dorado County Superior Court Case No. PC 20050255 ("Crawford Action");
- f. A lawsuit entitled *Edwards, et al. v., Suncrest Homes at Dallas Ranch LP*, Contra Costa County Superior Court Case No. C05-00387 ("Edwards Action");
- g. A lawsuit entitled *Kaiser, et al. v. KB Homes, et al.*, Contra Costa County Superior Court Case No. C05-00991 ("Kaiser Action");
- h. A lawsuit entitled *Markham, et al. v. Kaufman & Broad, et al.*, Contra Costa County Superior Court Case No. C06-01580 ("Markham Action");
- j. A lawsuit entitled *Craig, et al. v. KB Homes, et al.*, Contra Costa Superior Court case number C06-02303 ("Craig Action");
- k. A lawsuit entitled *Kenneth James, et al. v. Dependable Sheet Metal et al.*, Alameda Superior Court case number H 214815-5; ("James Action");
- l. A lawsuit entitled *Rajendrapal, et al. v. William Lyon, et al.* Alameda Superior Court case number HG 041678197 ("Rajendrapal Action");
- m. A lawsuit entitled *Beck et al. v. Presley, et al.* Alameda Superior Court case number H 213382-3 ("Beck Action");

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1 n. A lawsuit entitled *O'Neill v. Presley, et. al.* Alameda Superior Court case  
2 number H 214815-5 ("O'Neil Action");  
3 (Collectively, these lawsuits are hereinafter referred to as the "UNDERLYING  
4 ACTIONS").

5 28. In each of the UNDERLYING ACTIONS, the property damage was alleged to  
6 arise from a series of defects, multiple causes, and arising from the completed work performed  
7 by Counter-Claimant. For each such cause, property damage was sustained at different times,  
8 at different locations, which triggered each policy set forth herein entitling Counter-Claimant  
9 to both a full and complete defense and indemnification arising from any settlement, award, or  
10 judgment. The allegations contained in each of the aforementioned UNDERLYING  
11 ACTIONS (§ 27, a-n) triggered each of the INSCORP, RANGER, and TRANSAMERICA  
12 Policies. In addition, extrinsic evidence available in each such matter that triggered each of  
13 the INSCORP, RANGER, and TRANSAMERICA Policies with respect to the duty to defend  
14 and or indemnify Counter-Claimant for each of the UNDERLYING ACTIONS.

15 29. As a result of the UNDERLYING ACTIONS, Counter-Claimant has been  
16 compelled to incur loss and adjustment, defense fees and costs, settlement, mitigation, repair,  
17 and investigative costs as well as attorneys' fees, expert fees and other expenses.

18 30. Subsequent to the receipt of the complaints and cross-complaints naming  
19 Counter-Claimant in the UNDERLYING ACTIONS, Counter-Claimant timely tendered each  
20 of the UNDERLYING ACTIONS to Counter-Defendants INSCORP, RANGER, and  
21 TRANSAMERICA and ROES 1-100. Counter-Defendants INSCORP, RANGER, and  
22 TRANSAMERICA and ROES 1 - 100 were asked to provide liability coverage and asked to  
23 defend, and to the extent necessary, indemnify each of the UNDERLYING ACTIONS.

24 31. INSCORP and ROES 1 - 100 denied coverage to Counter-Claimant with respect  
25 to each of the UNDERLYING ACTIONS. RANGER and TRANSAMERICA have denied  
26 coverage to Counter-Claimant with respect to Cohen Action.

27 32. In response to tenders and requests that INSCORP, RANGER, and  
28 TRANSAMERICA and ROES 1 - 100 provide liability coverage in each of the

1 UNDERLYING ACTIONS in accordance with their policy terms and conditions, INSCORP  
2 and ROES 1 – 100 denied coverage or did not timely respond to the tender without reasonable  
3 basis. In response to tenders and requests that RANGER, TRANSAMERICA, INSCORP, and  
4 ROES 1–100 provide liability coverage in each of the UNDERLYING ACTION entitled  
5 *Cohen, et al. v. Presley Homes, et al.* and contrary to the policy terms and conditions,  
6 RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 denied coverage or did not  
7 timely respond to the tender without reasonable basis forcing Cross-Complainant to fund its  
8 own defense and settlement of the Cohen Action. With respect to the Kaiser Action,  
9 INSCORP without any reasonable basis denied coverage, compelling Counter-Claimant to  
10 fund its own settlement after RANGER and INSCORP, who were engaged in an allocation  
11 dispute, both refused to offer amounts sufficient to fund a \$49,999.56 settlement of the  
12 litigation. As a result of its insurers having effectively abandoned it on the verge of trial of the  
13 Kaiser action, Counter-Claimant was forced to undertake an obligation to expend its own  
14 monies to settle the litigation with the plaintiff homeowners. With respect to *Edwards, et al. v.*  
15 *Suncrest Homes at Dallas Ranch LP*, INSCORP, without any reasonable basis, denied  
16 coverage to Counter-Claimant, again compelling Counter-Claimant to fund its own settlement  
17 after RANGER and INSCORP, who were engaged in an allocation dispute, both refused to  
18 offer amounts sufficient to fund a \$20,000 settlement of the litigation. As a result of its  
19 insurers having effectively abandoned it on the verge of trial of the Edwards action, Counter-  
20 Claimant was forced to undertake an obligation to expend its own monies to settle the litigation  
21 with the plaintiff homeowners. Such refusals by INSCORP and RANGER were in bad faith  
22 causing the Counter-Claimant direct economic harm by forcing it, as the insured, to fund  
23 settlements of the Kaiser and Edwards actions. In each of the aforementioned cases, Counter-  
24 Defendants, and each of them, were fully informed of the terms, bases, and circumstances of  
25 each settlement, and did not raise any objection to either settlement and expressly or tacitly  
26 agreed that these settlements did not breach any cooperation clause within the subject insurance  
27 policies nor did the settlements constitute voluntary payments by Counter-Claimant.

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33. At all material times, Counter-Claimant sought and requested a full occurrence policy, rather than a modified occurrence policy. At the time of placement, neither HDR, GREGORY CLAUSER, nor INSCORP disclosed any limitation of coverage or that the INSCORP Policy was something other than a full occurrence policy. Furthermore, at no time did HDR or GREGORY CLAUSER explain to Counter-Claimant that INSCORP held a substantial ownership interest in HDR. At no time did HDR or GREGORY CLAUSER explain to Counter-Claimant the existence of and/or the significance of any limitation of coverage based on the term "manifest" as set forth in the INSCORP Policies. At no time did HDR or GREGORY CLAUSER inform Counter-Claimant that the INSCORP Policies contained an endorsement (IC IL 11 30 03 97) referred to as the "Continuous and Progressive Injury Limitations," an endorsement which was not included in the first INSCORP Policy (policy number CAIC 10016984 00 00). Counter-Claimant received the first INSCORP Policy, but it never received any copy of the Renewal Policies, declarations thereto, and/or said endorsement. Also, Counter-Claimant was never informed by any of the Counter-Defendants of a "Continuous and Progressive Injury Limitations" endorsement purportedly included in the INSCORP Policies. If in fact such an endorsement was included in the INSCORP Policies, its existence was concealed by Counter-Defendants INSCORP, HDR, and GREGORY CLAUSER. Moreover, INSCORP'S attempt to rely on the purported limitation of coverage given the uncertainty of when damage incepted, sustained, or manifested, did not constitute a reasonable basis for INSCORP to deny coverage. Furthermore, the coverage evaluation undertaken by INSCORP and/or its affiliates or agents HDR and NOVAPRO was not based on a defect-by-defect basis, as required under California law, in order to adequately protect the legal and financial interest of its insured. Further, INSCORP and/or its affiliates or agents HDR and NOVAPRO improperly denied coverage without conducting an adequate investigation of the underlying claims against Counter-Claimant as required by California law. At all material times, INSCORP, at a minimum, had a duty to defend the interests of Counter-Claimant in each of the UNDERLYING ACTIONS.

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1           34. To date, Counter-Defendants, and each of them, have denied repeated requests  
2 to act in accordance with its policy terms and conditions and have never provided a defense or  
3 acknowledged their coverage obligations to Counter-Claimant with respect to the Cohen  
4 Action. RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 have denied requests  
5 that they act in accordance with their policy terms and conditions and have never provided a  
6 defense or acknowledged their coverage obligations to Counter-Claimant with respect to the  
7 underlying Cohen Action. In Kaiser and Edwards, INSCORP improperly denied Counter-  
8 Claimant a defense, and both INSCORP and RANGER unreasonably failed to indemnify  
9 Counter-Claimant by unreasonably attempting to utilize a time on risk allocation ignoring  
10 California law which requires funding of all settlements up to policy limits if any damage  
11 occurred during the effective dates of the policy. INSCORP, as to all of the UNDERLYING  
12 ACTIONS, wrongfully denied coverage. With respect to the Kaiser and Edward actions,  
13 RANGER was required to indemnify Counter-Claimant and then at its discretion, pursue  
14 contribution against INSCORP.

15           35. Commencing from the date of each tender of defense of each of the  
16 UNDERLYING ACTIONS, RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100  
17 were required to investigate and participate in the defense of each of the UNDERLYING  
18 ACTIONS pursuant to the terms and conditions of the policies at issue. In addition,  
19 RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 had the legal obligation to  
20 meaningfully evaluate their respective coverage obligation of each UNDERLYING  
21 ACTIONS and communicate with Counter-Claimant regarding the investigation and  
22 evaluation of the tender of each UNDERLYING ACTIONS.

23           36. Notwithstanding the legal obligation to communicate, investigate, and  
24 participate in the defense of each UNDERLYING ACTIONS, INSCORP and ROES 1 – 100  
25 refused to respond to or accept said tenders of defense and failed to fund the defense of each  
26 UNDERLYING ACTIONS as agreed, as promised and as required under the terms of each  
27 policy at issue. Notwithstanding the legal obligation to communicate, investigate, and  
28 participate in the defense of each UNDERLYING ACTIONS, RANGER, TRANSAMERICA,

1 INSCORP, and ROES 1 – 100 refused to respond to or accept said tenders of defense and  
 2 failed to fund the defense of the underlying action entitled *Cohen, et al. v. Presley Homes, et*  
 3 *al.* as agreed, as promised and as required under the terms of each policy at issue.

4 37. Furthermore, RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100  
 5 each purposely ignored their duties to indemnify. RANGER unreasonably refused to  
 6 indemnify up to the policy limits even though some damages occurred during the effective  
 7 dates of their respective policies. With respect to Edwards and Kaiser, each of the Counter-  
 8 Defendants failed to indemnify Counter-Claimant with respect to the Edwards and Kaiser  
 9 Actions without reasonable bases.

10 38. At time of placement of each of the comprehensive/commercial general liability  
 11 insurance referred to hereinabove, RANGER, TRANSAMERICA, INSCORP, and ROES 1 –  
 12 100 promised to pay those sums which Counter-Claimant became obligated to pay because of  
 13 bodily injury and/or property damage sustained at each respective project stated in the  
 14 UNDERLYING ACTIONS caused by an occurrence, and further agreed to defend Counter-  
 15 Claimant with respect to any claims arising out of the work performed at each respective  
 16 project in the UNDERLYING ACTIONS on account of or potentially on account of such  
 17 alleged bodily injury and/or property damage, even if any of the claims were groundless, false,  
 18 or fraudulent.

19 39. Homeowner claimants/plaintiffs in the UNDERLYING ACTIONS have in fact  
 20 made allegations and claims indicating, or evidence is otherwise available, that bodily injury  
 21 and/or property damage occurred or potentially occurred during the effective periods of the  
 22 insurance policies issued by the Counter-Defendants.

### 23 **FIRST CAUSE OF ACTION**

#### 24 **Breach of Written Contract – Failure to Defend**

25 (Against RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100)

26 40. Counter-Claimant, repeats, re-alleges and incorporates by this reference each and  
 27 every allegation contained in all preceding paragraphs of this Counter-Claim as though set  
 28 forth at length herein.

41. As set forth above, RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 among other things agreed to investigate, adjust, defend and settle claims asserted against Counter-Claimant on account of bodily injury and/or property damage caused by an occurrence, falling within or potentially falling within the coverage of, or as defined in, each insurance policy referenced herein. Pursuant to each of these insurance policies, RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 also had a duty to conduct a reasonable, adequate and diligent investigation of any claims made against Counter-Claimant and affecting the Counter-Defendant insurers' respective duties to defend, as well as agreeing to pay for defense fees, costs and expenses for any damage claims arising out of the work of the named insureds.

42. RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 have issued insurance policies as attributed to them hereinabove. Said policies sold do in fact, at a minimum, potentially cover one or more of the allegations raised in each of the UNDERLYING ACTIONS and required INSCORP and ROES 1 – 100 to fully defend Counter-Claimant in the UNDERLYING ACTIONS. In addition, said policies require RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 to defend Counter-Claimant in each of the UNDERLYING ACTIONS, including *Cohen, et al. v. Presley Homes, et al.*

43. Counter-Claimant duly tendered the defense of each of the claims made against them in the UNDERLYING ACTIONS to Counter-Defendants, but INSCORP and ROES 1 – 150 have failed and refuse to respond to said tenders or have expressly refused to fully and adequately defend Counter-Claimant for the claims at issue in the UNDERLYING ACTIONS. In fact, INSCORP has routinely denied coverage without reasonable cause and has exercised a pattern of practice of denying coverage and in doing so, knew or should have known that such denial was incorrect. Counter-Claimant duly tendered the defense of each of the claims made against them in the underlying action entitled *Cohen, et al. v. Presley Homes, et al.* to Counter-Defendants RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100, but RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 have failed and refuse to respond to said tenders or have expressly refused to fully and adequately defend Counter-

1 Claimant for the claims at issue in the underlying action entitled *Cohen, et al. v. Presley*  
2 *Homes, et al.*

3 44. Counter-Claimant has performed all conditions, covenants and promises required  
4 to be performed in accordance with the terms and conditions of each written contract of  
5 insurance, except to the extent that Counter-Claimant was prevented by RANGER,  
6 TRANSAMERICA, INSCORP, and ROES 1 – 100, or excused from such performance, or  
7 said conditions, covenants and promises have accrued or have been waived.

8 45. As a result of each of the UNDERLYING ACTIONS being brought against  
9 Counter-Claimant, Counter-Claimant has been and will be forced to incur settlement, repair,  
10 loss adjustment and investigative costs, including attorneys' fees and costs, experts' fees and  
11 costs, court costs and other expenses, because of property damage and/or bodily injuries  
12 caused by an occurrence falling within, or potentially falling within, the coverage of, or as  
13 defined in, each of the policies referred to hereinabove. In breach of these insurance policies,  
14 INSCORP and ROES 1 – 100 through their officers and/or managerial agents, have refused  
15 and continue to refuse to respond to tenders notwithstanding repeated requests to do so and  
16 have refused to pay and/or reimburse Counter-Claimant for the costs of defense, repair, loss  
17 adjustment, mitigation, investigation, settlement and other costs and expenses as a result of  
18 each of the UNDERLYING ACTIONS. In breach of these insurance policies, RANGER,  
19 TRANSAMERICA, INSCORP, and ROES 1 – 100, through their officers and/or managerial  
20 agents, have refused and continue to refuse to respond to tenders notwithstanding repeated  
21 requests to do so and have refused to pay and/or reimburse Counter-Claimant for the costs of  
22 defense, repair, loss adjustment, mitigation, investigation, settlement and other costs and  
23 expenses as a result of the underlying action entitled *Cohen, et al. v. Presley Homes, et al.*

24 46. Counter-Claimant is informed and believes and thereon alleges that INSCORP  
25 and ROES 1 – 100 did not reasonably or diligently investigate the claims asserted in each of  
26 the UNDERLYING ACTIONS against Counter-Claimant or acknowledge and refused to  
27 accept Counter-Claimant's requests for coverage as to each of the respective UNDERLYING  
28 ACTIONS. Counter-Claimant is informed and believes and thereon alleges that RANGER,

1 TRANSAMERICA, INSCORP, and ROES 1 – 100 did not reasonably or diligently  
2 investigate the claims asserted in the underlying action entitled *Cohen, et al. v. Presley*  
3 *Homes, et al.* against Counter-Claimant or acknowledge and refused to defend. Additionally,  
4 Counter-Claimant is informed and believes and thereon alleges that INSCORP and ROES 1 –  
5 100 failed to properly respond to Counter-Claimant's requests to INSCORP and ROES 1 – 100  
6 for coverage, as well as to properly respond to other communications. Additionally, Counter-  
7 Claimant is informed and believes and thereon allege that RANGER, TRANSAMERICA,  
8 INSCORP, and ROES 1 – 100 failed to properly respond to Counter-Claimant's requests to  
9 RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 for coverage, as well as to  
10 properly respond to other communications in the underlying action entitled *Cohen, et al. v.*  
11 *Presley Homes, et al.*

12 47. The pattern and practice of RANGER, TRANSAMERICA, INSCORP, and  
13 ROES 1 – 100 denial of claims and refusal to provide coverage for Counter-Claimant, and  
14 refusal of RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 to timely respond  
15 and agree to defend was in knowing and conscious disregard of Counter-Claimant's  
16 entitlement to coverage and such conduct constitutes breaches of the terms and conditions of  
17 the policies at issue and was tortuous.

18 48. As a direct and proximate result of the breaches by RANGER,  
19 TRANSAMERICA, INSCORP, and ROES 1 – 100 of their respective duties, Counter-  
20 Claimant has incurred and will continue to incur substantial attorneys' fees and costs, experts'  
21 fees and costs, costs and other expenses in defense, repair, loss adjustment, mitigation,  
22 investigation and settlement and other costs and expenses in an amount within the  
23 jurisdictional limits of this Court, according to proof. As a direct and proximate result of the  
24 breaches of their respective contractual duties by RANGER, TRANSAMERICA, INSCORP,  
25 and ROES 1 – 100 and in mitigation of Counter-Claimant's own damages, Counter-Claimant  
26 has incurred and will continue to incur attorneys' fees and costs, experts' fees and costs and  
27 other costs and expenses in bringing this action, in an amount according to proof. Counter-  
28 Claimant has been damaged in an amount presently unknown, but in excess of the

jurisdictional minimum of this Court, to be established at the time of trial, according to proof.

## **SECOND CAUSE OF ACTION**

### **Breach of Written Contract – Failure to Indemnify**

(Against RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100)

49. Counter-Claimant repeats, re-alleges and incorporates by this reference each and every allegation contained in all preceding paragraphs of this Counter-Claim as though set forth at length herein.

50. As set forth above, RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 among other things agreed to investigate, adjust, defend, and indemnify Counter-Claimant for claims asserted against Counter-Claimant on account of bodily injury and/or property damage caused by an occurrence, falling within or potentially falling within the coverage of, or as defined in, each insurance policy referenced herein. Pursuant to each of these insurance policies, RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 had the specific duty to conduct a reasonable, adequate and diligent investigation of any claims made against Counter-Claimant and affecting the Counter-Defendant insurers' respective duty to indemnify, as well as agreeing to pay for Counter-Claimant's defense fees, costs and expenses for claims arising out of the work of Counter-Claimant at each respective project at issue in each of the UNDERLYING ACTIONS.

51. Counter-Claimant is informed and believes and thereon alleges that RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 issued insurance policies as attributed to them hereinabove. Said policies sold do in fact, at a minimum, potentially cover one or more of the allegations set forth in each of the UNDERLYING ACTIONS and require INSCORP and ROES 1 – 100 to fully indemnify Counter-Claimant in each of the UNDERLYING ACTIONS, and with respect to RANGER indemnify Counter-Claimant in *Cohen, et al. v. Presley Homes, et al.*; *Kaiser v. KB Homes*; and *Edwards, et al. v. Suncrest Homes at Dallas Ranch LP*.

52. Counter-Claimant duly tendered each of the claims made against them in each respective UNDERLYING ACTIONS to INSCORP and ROES 1 – 100, but INSCORP and

1 ROES 1 – 100 have failed and refused to respond to said tenders or have expressly refused to  
2 fully and adequately defend and indemnify Counter-Claimant for the claims brought against  
3 the Counter-Claimant in each of the UNDERLYING ACTIONS. Counter-Claimant duly  
4 tendered each of the claims made against them in each respective UNDERLYING ACTIONS  
5 to RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100, but RANGER,  
6 TRANSAMERICA, INSCORP, and ROES 1 – 100 have failed and refused to respond to said  
7 tenders or have expressly refused to fully and adequately defend and indemnify Counter-  
8 Claimant for the claims brought against the Counter-Claimant in the Cohen, Kaiser and  
9 Edwards Actions.

10 53. Counter-Claimant has performed all conditions, covenants and promises required  
11 to be performed in accordance with the terms and conditions of each written contract of  
12 insurance, except to the extent that Counter-Claimant was prevented by RANGER,  
13 TRANSAMERICA, INSCORP, and ROES 1 – 100, or excused from such performance, or  
14 said conditions, covenants and promises have accrued or have been waived.

15 54. As a result of each of the UNDERLYING ACTIONS being brought against  
16 Counter-Claimant, Counter-Claimant has been forced to incur and will continue to incur  
17 defense fees, repair costs, loss adjustment and investigative costs, property damages, other  
18 damages, including bodily injury damages of homeowners, if any, as well as attorneys' fees  
19 and costs, experts' fees and costs, court costs and other expenses, because of property damage  
20 and/or bodily injuries caused by an occurrence falling within, or potentially falling within the  
21 coverage of, or as defined in, each of the policies referred to hereinabove. In breach of these  
22 insurance policies, INSCORP and ROES 1 – 100 through their officers and/or managerial  
23 agents, have refused and continue to refuse to pay and/or reimburse Counter-Claimant for the  
24 costs of defense, indemnity, repair, loss adjustment, mitigation, investigation, settlement and  
25 other costs and expenses as a result of each of the UNDERLYING ACTIONS. In breach of  
26 these insurance policies, RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100  
27 through their officers and/or managerial agents, have refused and continue to refuse to pay  
28 and/or reimburse Counter-Claimant for the costs of defense, indemnity, repair, loss adjustment,

1 mitigation, investigation, settlement and other costs and expenses as a result of the Cohen,  
2 Edwards and Kaiser Actions.

3 55. Counter-Claimant is informed and believes and thereon alleges that INSCORP  
4 and ROES 1 – 100 did not reasonably or diligently investigate the claims asserted in each of  
5 the UNDERLYING ACTIONS against Counter-Claimant or acknowledge and/or accept  
6 Counter-Claimant's requests for coverage as to each respective UNDERLYING ACTIONS.  
7 Additionally, Counter-Claimant is informed and believes and thereon alleges that INSCORP  
8 and ROES 1 – 100 failed to properly respond to Counter-Claimant's requests to such  
9 INSCORP and ROES 1 – 100 for coverage, as well as to properly respond to other  
10 communications.

11 56. Counter-Claimant is informed and believes and thereon alleges that RANGER,  
12 TRANSAMERICA, INSCORP, and ROES 1 – 100 did not reasonably or diligently  
13 investigate the claims asserted in the underlying Cohen Action. RANGER, INSCORP, and  
14 ROES 1 – 100 did not reasonably or diligently investigate the claims in the Kaiser and  
15 Edwards Action against Counter-Claimant or acknowledge and/or accept Counter-Claimant's  
16 requests for indemnity as to the underlying Cohen Action, Kaiser Action, and the Edwards  
17 Action. Additionally, Counter-Claimant is informed and believes and thereon alleges that  
18 RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 failed to properly respond to  
19 Counter-Claimant's requests to RANGER, TRANSAMERICA, INSCORP, and ROES 1 –  
20 100 for coverage, as well as to properly respond to other communications.

21 57. The failure and refusal of RANGER, TRANSAMERICA, INSCORP, and ROES  
22 1 – 100 to provide appropriate coverage for Counter-Claimant, and the failure to indemnify  
23 constitutes breaches of the terms and conditions of the policies at issue.

24 58. As a direct and proximate result of the breaches by RANGER,  
25 TRANSAMERICA, INSCORP, and ROES 1 – 100 of their respective duties, Counter-  
26 Claimant has incurred and will continue to incur substantial attorneys' fees and costs, experts'  
27 fees and costs and other costs and expenses in its defense, indemnity, repair, loss adjustment,  
28 mitigation, investigation and settlement as well as other costs and expenses in an amount

1 within the jurisdictional limits of this Court, according to proof. As a direct and proximate  
 2 result of the breaches of their respective contractual duties by RANGER, TRANSAMERICA,  
 3 INSCORP, and ROES 1 – 100 and in mitigation of Counter-Claimant's own damages,  
 4 Counter-Claimant has also incurred attorneys' fees and costs, experts' fees and costs and other  
 5 costs and expenses in bringing this action, in an amount according to proof. Counter-Claimant  
 6 has been damaged in an amount presently unknown, but in excess of the jurisdictional  
 7 minimum of this Court, to be established at the time of trial, according to proof.

### 8 **THIRD CAUSE OF ACTION**

#### 9 **Breach of the Implied Covenant of Good Faith and Fair Dealing –**

#### 10 **Failure to Defend**

11 (Against RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100)

12 59. Counter-Claimant repeats, re-alleges and incorporates by this reference each and  
 13 every allegation contained in all preceding paragraphs of this complaint as though set forth at  
 14 length herein.

15 60. RANGER, TRANSAMERICA, INSCORP, and ROES 1 – 100 at all material  
 16 times had the duty to act fairly and in good faith to Counter-Claimant in carrying out their  
 17 responsibilities under their respective policies of insurance.

18 61. Pursuant to the insurance policies, RANGER, TRANSAMERICA, INSCORP,  
 19 and ROES 1 – 100 have implicit obligations to act fairly and in good faith to Counter-  
 20 Claimant, to promptly and reasonably investigate claims against Counter-Claimant, and to  
 21 make reasonable coverage decisions. The policies identified herein are subject to an implied  
 22 covenant of good faith and fair dealing such that no party will disturb the rights of the other to  
 23 obtain the full benefits of the contract. RANGER, TRANSAMERICA, INSCORP, and ROES  
 24 1 – 100 have breached the implied covenant of good faith and fair dealing by repeatedly and  
 25 routinely refusing to defend all of the respective UNDERLYING ACTIONS, and/or to  
 26 provide necessary coverage owed under the policies when tendered, and at all material times  
 27 thereafter, notwithstanding repeated requests to do so.

28 62. Counter-Claimant is informed and believes and thereon alleges that RANGER,

1 TRANSAMERICA, INSCORP, and ROES 1 – 100 breached their respective obligations to  
2 act fairly and in good faith towards Counter-Claimant by committing, among other things, the  
3 following acts and omissions:

4 a. After receipt of tender thereof and repeated communications from  
5 Counter-Claimant to Counter-Defendants wherein they unreasonably refused to  
6 defend Counter-Claimant in the UNDERLYING ACTIONS and RANGER AND  
7 TRANSAMERICA refusing to defend Counter-Claimant in the Cohen Action;

8 b. Refusing to conduct a reasonable investigation and unreasonably  
9 and knowingly withholding monetary benefits under the policy;

10 c. Adopting unreasonable and unwarranted interpretation and  
11 applications of provisions and exclusions in the Policies to the detriment of  
12 Counter-Claimant's interest in the UNDERLYING ACTIONS and as to  
13 RANGER AND TRANSAMERICA in the Cohen Action;

14 d. Unreasonably, purposefully, and intentionally interpreting the  
15 allegations and claims of the homeowner Counter-Claimant and inaccurately  
16 solely in an attempt to avoid coverage obligations owed to Counter-Claimant;

17 e. Causing the insureds severe financial hardship, including, but not  
18 limited to, attorneys' fees and costs, by refusing to defend Counter-Claimant;

19 f. Refusing to timely, promptly and without delay, pay for the  
20 reasonable and necessary defense costs incurred by Counter-Claimant from the  
21 time of tender through the present;

22 g. Refusing to provide Counter-Claimant with any reasonable or  
23 justifiable basis for the decision to deny and/or delay a full defense in the in the  
24 UNDERLYING ACTIONS and as to RANGER AND TRANSAMERICA in the  
25 Cohen Action;

26 h. Embarking on a course of conduct and pattern and practice,  
27 whereby, Counter-Defendants would refuse to respond fully to tenders made by  
28 or on behalf of and/or to acknowledge the defense and indemnity obligations

1 owed to Counter-Claimant and/or to participate in the mounting and funding of  
2 the defense of Counter-Claimant as to INSCORP in the UNDERLYING  
3 ACTIONS and as to RANGER AND TRANSAMERICA in the Cohen Action;

4 i. As part of their pattern and practice, Counter-Defendants have  
5 consistently refused to defend policyholders in construction defect cases on a  
6 regular basis without reasonable basis, and have wrongfully and purposefully,  
7 and in conscious disregard of the insureds' rights, refused to defend when it had  
8 a known obligation to do so;

9 j. Continuing to pursue such course of conduct and pattern and  
10 practice after publication of, and notwithstanding the requirements set forth  
11 under California law mandating an immediate defense obligation; and

12 k. Pursuing such a course of conduct and pattern and practice in  
13 violation of the terms of the policies and California law with the knowledge,  
14 understanding, consent and approval of the respective managing officers,  
15 directors, agents and employees of RANGER, TRANSAMERICA, INSCORP,  
16 and ROES 1 – 100.

17 63. The respective officers, directors, and managing agents and employees of  
18 RANGER, TRANSAMERICA, INSCORP, and ROES 1-100 participated in, authorized and  
19 ratified the wrongful conduct of said Counter-Defendants as alleged above. As a result of the  
20 bad faith conduct of INSCORP and ROES 1 – 100 in this matter, Counter-Claimant have  
21 incurred substantial attorneys' fees, costs and expenses in defense, repair, loss adjustment,  
22 mitigation, investigation, settlement and other costs and expenses in response to each of the  
23 UNDERLYING ACTIONS and has been required to bring this Counter-Claim to enforce their  
24 rights under the policies mentioned herein. As a result of the bad faith conduct of RANGER,  
25 TRANSAMERICA, INSCORP, and ROES 1-100 in this matter, Counter-Claimant has incurred  
26 substantial attorneys' fees, costs and expenses in defense, repair, loss adjustment, mitigation,  
27 investigation, settlement and other costs and expenses in response underlying action entitled  
28 *Cohen, et al. v. Presley Homes, et al.* Counter-Claimant has been required to bring this

Counter-Claim to enforce their rights under the policies mentioned herein. Counter-Claimant is therefore entitled to recover as damages against INSCORP and ROES 1 – 100 all the aforementioned fees, costs and expenses which they have incurred as a result of each of the UNDERLYING ACTIONS together with interest thereon. Counter-Claimant is therefore entitled to recover as damages against RANGER, TRANSAMERICA, INSCORP, and ROES 1-100 all the aforementioned fees, costs and expenses which they have incurred as a result of the underlying action entitled *Cohen, et al. v. Presley Homes, et al.* together with interest thereon. Counter-Claimant has suffered damages and will continue to suffer damages within the jurisdiction of this Court, according to proof.

64. Counter-Defendant is further entitled to recover as damages against RANGER, TRANSAMERICA, INSCORP, and ROES 1-100 all fees, expenses and costs incurred in this action to enforce their rights under the respective insurance policies, plus interest thereon, according to proof.

65. The above described conduct of RANGER, TRANSAMERICA, INSCORP, and ROES 1-100 has been and continues to be unreasonable, capricious, and arbitrary, and constitutes a breach of the covenants of good faith and fair dealing contained in each and all of the insurance policies referred to above in this Counter-Claim. The above-described conduct further constitutes malicious, oppressive and despicable conduct and conscious disregard of Counter-Claimant's rights, and stems from improper and evil motives, including Counter-Defendants' desire to reduce or avoid their obligations to Counter-Claimant, so as to justify an award of punitive and exemplary damages.

#### **FOURTH CAUSE OF ACTION**

##### **Breach of the Implied Covenant of Good Faith and Fair Dealing –**

##### **Failure to Indemnify**

(Against RANGER, TRANSAMERICA, INSCORP, and ROES 1-100)

66. Counter-Claimant repeats, re-alleges and incorporates by this reference each and every allegation contained in all preceding paragraphs of this complaint as though set forth at length herein.

1        67. RANGER, TRANSAMERICA, INSCORP, and ROES 1-100 at all material times  
2 had the duty to act fairly and in good faith to Counter-Claimant in carrying out their  
3 responsibilities under their respective policies of insurance.

4        68. Pursuant to the insurance policies, RANGER, TRANSAMERICA, INSCORP,  
5 and ROES 1-100 have implicit obligations to act fairly and in good faith to Counter-Claimant,  
6 to promptly and reasonably investigate claims against Counter-Claimant, and to make  
7 reasonable coverage decisions. The policies identified herein are subject to an implied  
8 covenant of good faith and fair dealing such that no party will disturb the rights of the other to  
9 obtain the full benefits of the contract. INSCORP and ROES 1 – 100 breached the implied  
10 covenant of good faith and fair dealing when refusing to agree to indemnify each respective  
11 UNDERLYING ACTIONS, and/or to provide necessary coverage owed under each of the  
12 policies when tendered. At all material times, notwithstanding requests for coverage by  
13 Counter-Claimant to RANGER, TRANSAMERICA, and ROES 1-100, breached the implied  
14 covenant of good faith and fair dealing when refusing to agree to indemnify Counter-Claimant  
15 in the Cohen, Edwards and Kaiser Actions.

16        69. Counter-Claimant is informed and believes and thereon alleges that RANGER,  
17 TRANSAMERICA, INSCORP, and ROES 1-100 breached their respective obligations to act  
18 fairly and in good faith towards Counter-Claimant by committing, among other things, the  
19 following acts and omissions:

20            a. Refusing to fully and/or adequately protect the interests of Counter-  
21 Claimant in each of the UNDERLYING ACTIONS after receipt of tender thereof  
22 and repeated communications from Counter-Claimant to RANGER,  
23 TRANSAMERICA, INSCORP, and ROES 1-100 thereafter, which were ignored  
24 in their entirety;

25            b. Refusing to conduct a reasonable investigation and unreasonably  
26 withholding monetary payment of defense and indemnity;

27            c. Unreasonably, purposefully, and intentionally refusing to fund  
28 reasonable settlements of the Kaiser and Edwards Actions because of their